IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

JOHN DOE	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Civil Action No. 1:17-cv-00401(TSE/MSN)
MARYMOUNT UNIVERSITY,	)	
LINDA MCMURDOCK, and	)	
JANE ROE,	)	
	)	
Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS MARYMOUNT UNIVERSITY AND LINDA MCMURDOCK'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendants Marymount University and Linda McMurdock submit this Memorandum of Points and Authorities in support of their Motion to Dismiss Plaintiff John Doe's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted.

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PRELIMINARY STATEMENT

Plaintiff John Doe is currently suspended from Marymount University (the "University") following the University's investigation and adjudication of an allegation that plaintiff engaged in nonconsensual sexual intercourse with a fellow student in his dorm room in November 2014. Plaintiff will be eligible to return to the University in the fall of 2018. In this lawsuit, plaintiff has sued the University and the University's Title IX Coordinator (in her individual capacity). He has also sued Jane Roe for allegedly defaming him.

Plaintiff begins his Complaint by acknowledging that private universities have: (1) the obligation to investigate and adjudicate allegations like the ones Jane Roe made against him and (2) the discretion to specify "how they will investigate and adjudicate allegations of sexual assault by their students." Compl. ¶ 1. In the very next paragraph, however, plaintiff contradicts himself and complains that the clear procedures that Marymount has adopted and publicized to adjudicate and resolve allegations of sexual assault on its campus "cannot stand." *Id.* at ¶ 2.

That bald contradiction demonstrates that this lawsuit is not about any breached legal duty owed to plaintiff, but is instead about plaintiff's frustration and subjective views about what he thinks the University's process *should have* entailed (notwithstanding the University's published procedures) and what he thinks outcome the University's process *should have* been (notwithstanding the University's obligation to make its own creditability determinations to resolve allegations of sexual assault).

The Complaint and documents in the record on this motion demonstrate the following: Consistent with federal law and the University's written policies and procedures, two University investigators conducted an investigation of Jane Roe's complaint that plaintiff sexually assaulted her. The investigators conducted no fewer than fifteen separate interviews of twelve different people. *See* Declaration of Jason A. Ross ("Ross Decl.") Ex. 2. In the course of their investigation, the investigators had the opportunity to evaluate the credibility of all witnesses live and in person, including plaintiff and Roe. At the conclusion of their investigation, the investigators generated a thirty-two page single spaced Investigative Report. *Id.*

Plaintiff was provided with the opportunity to review the Investigative Report and propose changes no fewer than three separate times before the Report was put into final draft. Plaintiff was represented by counsel at every step of the investigation. Having considered all the evidence, the investigators concluded – consistent with the University's published procedures – that Roe's allegations and the gathered evidence merited a review by an adjudicator because Roe's allegations, if true, would support a finding that plaintiff violated University policy.

Upon review of the Investigative Report and nearly one hundred pages of additional supporting factual material, the University's adjudicator concluded by a preponderance of the evidence that plaintiff had violated the University's policies by engaging in nonconsensual sexual intercourse with Roe. Plaintiff is at pains to protest the adjudicator's failure to meet with him in person, but the University's written procedures are clear on that point: the adjudicator has discretion to meet with the parties – or not – prior to reaching a conclusion. Notably, plaintiff does not allege that the adjudicator met with Roe, either.

Plaintiff was afforded the opportunity to appeal, and did so. The investigators' and adjudicator's conclusions were affirmed, and plaintiff was suspended for two years. Plaintiff now argues in conclusory fashion that the determinations of both investigators, the adjudicator, and the appellate officer were motivated by his gender. The University understands that this matter has had a meaningful impact on John Doe and his family's life – as on Jane's life – and the University understands the emotions underlying this civil action. Emotion, however, does not create a cognizable legal claim.

Indeed, instead of stating a claim plaintiff argues stridently that the case against him should have been resolved differently. But the question in this federal lawsuit is not whether plaintiff, standing in the shoes of the adjudicator, would have drawn different conclusions. Nor is it whether the Court would have done so. The question is instead whether the University discriminated against plaintiff on the basis of his gender or otherwise violated a legal duty owed to plaintiff. Plaintiff's attempt to relitigate the merits of the University's decision in this Court – to ask this Court to second guess the credibility determinations and sanctions imposed by a private educational institution – is improper and reinforces a poor precedent. This Court is not a super-appellate panel for internal disciplinary decisions, and plaintiff's argument that the case against him should have been resolved differently misapprehends the legal standard and the role of this Court.

Notwithstanding plaintiff's characterizations, the actual narrative of this case is that University properly acted on its obligation to all students to investigate and adjudicate allegations of sexual misconduct, and as a result of that process, plaintiff was disciplined. Plaintiff fails to state a claim as a matter of law, and his complaint should be dismissed in its entirety with prejudice.

STATEMENT OF ALLEGED FACTS[1]

I. The University's Policy and Procedures

The University's *Sexual Harassment and Interpersonal Misconduct Policy* (the "Policy") provides the framework for analyzing and disposing of complaints of sexual misconduct at the

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[1] Although the University strongly disagrees with many of the allegations in the Complaint, the University and the Court are required to accept plaintiff's well-pleaded allegations as true for purposes of this motion. This Statement is thus based on the factual allegations set forth in the Complaint as well as written documents quoted from, characterized, or referenced in the Complaint, but which plaintiff did not attach to the Complaint.

University. A copy of the Policy has been filed concurrently with the University's Motion,[2] and is summarized below. The Policy sets out both the procedural and substantive elements of the University's responses to allegations of sexual misconduct, but the Policy explicitly states that it "is not a contract." Instead, "it presents the policies in effect at the time of publication and is subject to change by the University at any time." Ross Decl. Ex. 1 at 1.

The Policy identifies and defines prohibited conduct, including sexual assault, sexual violence, dating violence, domestic violence, stalking, sexual harassment, and related concepts like consent. *See id.* at 5-9. Relevant here, the Policy prohibits "non-consensual sexual intercourse," which is, in relevant part, "[h]aving or attempting to have sexual intercourse with another individual . . . without effective consent." *Id.* at 8. Effective consent means "mutually understandable words and/or actions that clearly indicate a willingness to engage freely in sexual activity." *Id.*

The Policy also specifies the review, investigation, and resolution process. Ross Decl. Ex. 1 at 23. As a threshold matter, the University's Policy makes clear that it is

> committed to protecting the privacy of all individuals involved in a report of sexual harassment, sexual violence, stalking and intimate partner violence. In any report under this policy, every effort will

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[2] On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a Court is free to examine not just the pleadings but any documents attached to or referenced in the pleadings as well. *See Occupy Columbia v. Haley*, 738 F.3d 107, 116 (4th Cir. 2013). Likewise, under Federal Rule of Evidence 201, when ruling on a motion to dismiss, a Court may take judicial notice of a fact "not subject to reasonable dispute" that can be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Zak v. Chelsea Therapeutics Int'l, Ltd.*, 780 F.3d 597, 607 (4th Cir. 2015); *see also Sarvis v. Judd*, 80 F. Supp. 3d 692, 697 (E.D.Va. 2015) ("In considering a motion to dismiss, the court may properly take judicial notice of matters of public record").

As such, the Declaration of Jason A. Ross, filed concurrently with this memorandum of law, attaches some of the documents upon which plaintiff relies in his complaint. These documents do not convert this motion to dismiss to one for summary judgment for the reasons set forth above. A copy of Policy in effect during the time period relevant to the Complaint is attached to the Ross Declaration as Exhibit 1. A copy of the Investigative Report is attached as Exhibit 2 (under seal only). Selected University correspondent to plaintiff referenced or characterized in the Complaint are attached as Exhibits 3, 4, and 5 (under seal only).

> be made to protect the privacy interests of all individuals involved in a manner consistent with the need for a careful assessment of the allegation and any necessary steps to eliminate the harassment, prevent its recurrence, and address its effects.

Id. at 5. In practice, this means that "information related to a report of misconduct will only be shared with a limited circle of individuals." *Id.* As discussed further below, these concerns may result in contact restrictions among the parties and other students while a report is pending.

From a procedural perspective, a complaint alleging violation of the Policy is presented or referred to the University's Title IX Coordinator. *Id.* Once an internal administrative complaint is brought by a student (the "complainant") against another student (the "respondent") for sexual misconduct, the University conducts an "initial Title IX assessment." *Id.* at 23-24. The purpose of the assessment is to determine, among other things, whether the initiation of an investigation is warranted. *Id.* at 24.

If there is a sufficient basis to proceed with an investigation, the University will designate an investigative team, typically comprised of two investigators. *Id.* at 26. The investigative team gathers relevant information by interviewing the complainant and respondent, asking them to provide any electronic or physical evidence pertaining to the allegations, and soliciting the names of witnesses who may also have information for the team to interview. *Id.* During the process, the complainant and respondent have an equal opportunity to be heard, to submit information, and to identify witnesses. *Id.*

Concurrent with the initial assessment and investigation, the University may impose nonpunitive interim measures. *Id.* at 23. Interim measures assume no determination of responsibility, and may, among other things, include no-contact orders, restrict a student's ability to attend classes, and impact access to certain areas of campus. *Id.* at 22-23. Such measures are intended to preserve the status quo while an investigation proceeds without risking potential further trauma to either party, disruptions on campus, and/or retaliation by or against either party. *Id.* at 23.

At the conclusion of the investigation, the investigative team prepares a written report summarizing the information gathered in the investigation and synthesizing areas of agreement and disagreement among the parties. *Id.* at 27. The investigative team has discretion as to the material included in the investigative report, and may include or exclude information on basis of, among other considerations, its relevance and/or its prejudice versus probity. *Id.* Before the written report is finalized, the complainant and respondent have the opportunity to review the draft report to provide comments and submit additional information or evidence. *Id.*

Once the complainant and respondent have had the opportunity to review and comment on the written report, the investigative team finalizes the report and makes a finding as to whether or not sufficient information has been alleged in the course of the investigation to suggest that a Policy violation has occurred. *Id.* If the investigative team concludes that, if true, the complainant's allegations would amount to a violation of the Policy, the parties are notified in writing with a notice of charge, and the matter is referred to an adjudicator. *Id.*

The adjudicator then makes a determination, based on a preponderance of the evidence, as to whether the respondent is responsible for a violation of the Policy. *Id.* at 27-28. In reaching a decision, the adjudicator has discretion to consult with the parties, the Title IX Coordinator, and others, or rely on the investigative report. *Id.* at 28. The exact Policy language on this point is as follows:

> In reaching a determination of responsibility, the Adjudicator will consult with the Complainant, the Respondent, the Title IX Coordinator, and other affected parties, ***as appropriate*** to ensure a full assessment of the relevant facts. Each party may also submit a written impact statement to the Adjudicator for consideration. ***If a Complainant or Respondent meets with the Adjudicator***, they may be accompanied by a Support Person.

Id. (emphases added). Contrary to plaintiff's tortured reading of this provision, the Policy explicitly contemplates both the circumstance in which the parties will meet with the adjudicator and that in which they will not.

If the adjudicator determines that the respondent is responsible for a violation of the Policy, the adjudicator is tasked with imposing a sanction designed to eliminate the misconduct, prevent its recurrence, remedy its effects, deter future misconduct, and support the University's educational mission and adherence to federal law. *Id.* at 29. Both the respondent and the complainant are given the opportunity to provide an impact statement prior to sanctioning. *Id.* The published range of sanctions includes, among others, suspension and expulsion from the University. *Id.* Written notice of the outcome is provided to both parties. *Id.*

Both parties are provided with the right to appeal the adjudicator's decision, but the grounds for appeal are limited to: (1) information that could affect the outcome that was unavailable at the time of the adjudication; or (2) a material deviation from the Policy that resulted in an unfair outcome. *Id.* In other words, the purpose of an appeal is not to reargue the merits of the adjudication. An appeal, if sought, is due within five days of the notice of outcome, and each side is provided with an opportunity to respond to the opposing party's written submission on appeal within three days. *Id.* at 30.

Once a party has triggered his or her appellate rights, the University appoints an appellate officer to hear the appeal (an "appellate authority"). The appellate authority's review is limited to the two articulated, proper bases for appeal. *Id.* Except as required to explain the basis of newly discovered evidence, if any, the appeal is limited to the written investigative report and supporting documents. *Id.* The appellate authority's decision on the appeal is final. *Id.*

II. The Sexual Encounter and Jane Roe's Complaint

Plaintiff alleges that on November 8, 2014, he and Jane Roe arranged to meet at his dorm room. Jane arrived at plaintiff's room around six in the evening. Plaintiff alleges that when Jane arrived, the two talked with plaintiff's roommate. After about twenty minutes, plaintiff's roommate left, and plaintiff and Jane began to kiss and fondle one another, but plaintiff contends they did not touch one another's genitals.

After about thirty minutes, Jane said she would like to leave. Plaintiff concedes that he leaned against the door, preventing Jane from opening it. Plaintiff characterizes this behavior as playful. Plaintiff alleges that while he was leaning against the door preventing it from being opened, Jane kissed him on the cheek, and told him she needed to see her friends. Plaintiff alleges he then stood aside and she left. *See* Compl. ¶¶ 59-69.

Later that evening, plaintiff texted Roe to ask what she was up to. Jane texted back that evening to say she was eating pizza. Over the next few days, plaintiff continued to text her, but she was slow to respond or did not respond to his messages. On November 15, plaintiff texted Jane to ask whether something was wrong, and she texted back that while plaintiff was a nice guy, he had gotten really pushy with her. Plaintiff responded that he was sorry to have frightened her. The two did not communicate again. *Id.* at ¶¶ 70-74.

Plaintiff relies on the University's Investigative Report in alleging that Roe's roommate later said that Jane was "happy" and "giddy" when she returned to her dorm, *see id.* at ¶ 75, and that Jane later said that plaintiff had been "aggressive" with her and that she "didn't ask for it." *Id.* at ¶ 78.

Jane Roe's version of events was very different.[3] In the investigation conducted by the University, Roe contended that on November 8, 2014, she visited plaintiff in his dorm room where she socialized with plaintiff and his roommate for a while. Ross Decl. Ex. 2 at 10. Once plaintiff's roommate left, Roe and plaintiff began to kiss. *Id.* Roe told the University's investigators that as soon as plaintiff started removing her clothing, she told plaintiff "no," and that plaintiff took her "nos" as an indication to try harder to convince her to continue the encounter. *Id.* Roe told the investigators that plaintiff performed oral sex on her without her consent, then blocked the door when she tried to leave his room. *Id.*

III. Jane Roe's Reported Sexual Assault and Resulting Investigation and Adjudication.

Plaintiff alleges that on September 8, 2015, the University's Title IX Coordinator, Linda McMurdock, whom plaintiff has named individually as a defendant in this action, informed him that Jane had alleged that plaintiff had sexually assaulted her in November 2014. Compl. ¶ 80. Dr. McMurdock also informed plaintiff that the University had imposed a no-contact order between plaintiff and Roe. *Id.* at ¶ 81. Consistent with the University's approach to confidentiality and privacy, plaintiff was also prohibited from discussing Jane's allegations against him with other students (apart from support persons provided by the University for participants in its process). *Id.* at ¶ 82. Plaintiff received written notice of these allegations and terms.[4] *Id.* at ¶ 85.

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3 Although the Court is not obligated to give facts alleged by Roe in the University's investigation the presumption of truth (to which plaintiff's allegations are entitled), the Court may take judicial notice of the fact that Roe made allegations contrary to plaintiff's at the investigation state of the University's proceedings. The full version of events provided by Roe to the investigators begins at page 10 of the Investigative Report.

4 Doe alleges that he didn't receive notice at this time of "a specific date" the encounter was alleged to have occurred, *see id.* at ¶ 86, but the Court may reasonably take from plaintiff's other allegations that the two had only one intimate encounter, so this allegation appears to elevate form over substance.

The University appointed two investigators to investigate Jane's allegations (the "investigative team") who interviewed plaintiff on September 21, 2016.[5] *Id.* at ¶¶ 89, 91. The investigative team interviewed Jane on October 1, 2015. *Id.* at ¶¶ 96-97. Characterizing the Investigative Report, plaintiff alleges that in Jane's interview she told the investigative team that he forcefully attempted to remove her clothing, performed oral sex on her without her consent, struck her with his fist in her vagina, and locked his door from the inside. *Id.* at ¶¶ 98-100. On November 18, the investigative team interviewed Jane a second time to ascertain the timeline for the incident, and specifically whether some of Jane's texts to plaintiff occurred before or after the alleged assault. *Id.* at ¶ 108.

On November 24, 2015, plaintiff was invited to review a copy of the draft investigative report, which he did on December 1, 2015. *Id.* at ¶¶ 109, 114. On December 15, plaintiff reviewed the investigative report again with his attorney, whom plaintiff alleges the University had not permitted to accompany plaintiff during his first review of the report. *Id.* at ¶ 112. On December 22, plaintiff submitted to the University a detailed response to the draft investigative report identifying aspects of the report he believed should be amended. *Id.* at ¶ 116-19.

On February 2, 2016, plaintiff was advised that the investigative team had revised the investigative report, and he was invited to review and comment on the revised report. *Id.* at ¶ 121. On February 3, 2016 plaintiff and his attorney reviewed the revised report. *Id.* at ¶ 122. Plaintiff alleges that the investigative team had removed none of the statements he objected to, and had moreover not adequately responded to his other requests. *Id.* at ¶ 123. On February 10, plaintiff submitted a second response to the draft report, and on March 18, the University alerted

[5] Plaintiff's Complaint identifies this date as September 21, 2016, but in context the University respectfully suggests that the Court should infer the insertion of "2016" was inadvertent, and this interview actually occurred on September 21, ***2015***.

plaintiff that it had again revised the draft. Plaintiff was given an opportunity to review this draft as well, which in some respects plaintiff found acceptable, but which he still believed fell short. *Id.* at ¶¶ 123-26. The University then provided plaintiff a third opportunity to respond to the draft report, which plaintiff did on May 5, 2016. *Id.* at ¶ 136. The three sets of requested changes proposed by plaintiff thus brought the process from February 2, 2016 until May 5, 2016.

On May 12, 2016 the University provided plaintiff with a written notice of charge explaining that the investigative team had concluded that the allegations adduced in the investigation supported bringing the matter to an adjudication. *Id.* at ¶ 137. Plaintiff was informed via the notice of charge of the identity of the adjudicator, and the University provided the adjudicator with the final Investigative Report. *Id.* at ¶¶ 138, 140. Plaintiff requested a face-to-face meeting with the adjudicator, but the adjudicator determined, in his discretion, that a face-to-face meeting with either the respondent or the complaint was not necessary to thoroughly assess the facts of the case. *Id.* at ¶ 143.

On June 22, 2016, the adjudicator determined by a preponderance of evidence that plaintiff had violated the University's Policy regarding Non-Consensual Sexual Intercourse. *Id.* at ¶ 146; *see also* Ross Decl. Ex. 3. Contrary to plaintiff's misleading characterization, however, the adjudicator did not exclude from consideration any information that dealt directly with the violation. *Id.* at ¶ 149; *see also* Ross Decl. Ex. 3. Both parties submitted impact statements for sanctioning purposes, and on July 11, 2016 the adjudicator suspended plaintiff from the University for two years. *Id.* at ¶ 160; *see also* Ross Decl. Ex. 4.

On July 18, 2016 plaintiff appealed on three bases. *Id.* at ¶¶ 161-62. He contended that (1) the adjudicator failed to conduct a thorough and fair review of the evidence; (2) the adjudicator failed to consult with him in determining the outcome; and (3) that the final investigative report contained improper statements. *Id.* at ¶¶ 162-64. The first and third of these grounds for appeal were rejected as outside the scope of the Policy's appeal grounds, and the second was rejected as not inconsistent with the University's process, since the adjudicator has discretion as to whether to meet with the parties. *Id.* at ¶¶ 167-69; Ross Decl. Ex. 5. As he does in this lawsuit, plaintiff presented on appeal a tortured reading of the University's policy, which was addressed and rejected by the appellate authority. *See* Ross Decl. Ex. 5; *see also* Ross Decl. Ex. 1 at 28 (conferring discretion on appellate authority as to whether to meet with parties). As a result, plaintiff's appeal was denied, and plaintiff's suspension became final.

IV. The Allegations in this Lawsuit

At bottom, plaintiff's allegations can be reduced to an argument that the University reached what plaintiff believes was the wrong outcome. Unfortunately, the only two people who may ever know for certain what happened in plaintiff's dorm room are Doe and Roe. As a result, the obligation of the University was to hear each party's side and resolve differences in their stories as best it could under a preponderance of the evidence standard.

Plaintiff's claims fail because he alleges no facts showing that the University discriminated against him on the basis of his gender (or otherwise violated a legal duty owed to him). The allegations of the complaint – almost entirely limited to reasons why plaintiff would have decided this case differently – do not adduce not a single particularized allegation of gender-motivated bias related to the adjudication of Jane Roe's claim against him. He contends the University breached a "contract" with him, but does not identify any contractual relationship. He alleges the University (and Dr. McMurdock individually) were negligent, but articulates no duty owed nor any breach of that duty. In sum, what plaintiff is seeking here is a do-over, and this Court should not permit it.

CHOICE OF LAW

All acts underlying this lawsuit occurred in Arlington, Virginia. As a result, Virginia law governs plaintiff's state-law claims. If there were any dispute as to whether Virginia law should apply, and, moreover, the Court were to find that a conflict existed, Virginia law would still apply because Virginia has the "materially greater interest." *Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co., Inc.*, 386 F.3d 581, 619 (4th Cir. 2004). This conclusion is correct whether the question is analyzed from the perspective of diversity jurisdiction, *see Klaxon Co. v. Stentor Electric Manufacturing Co.,* 313 U.S. 487, 497 (1941) or supplemental jurisdiction, *see East West, LLC v. Rahman*, 873 F. Supp. 2d 721, 727 (E.D.Va. 2012) both of which compel the Court to apply the choice of law rules of Virginia.

LEGAL STANDARD

Where a plaintiff does not plead sufficient facts to support the claims he asserts in his complaint, a Court should dismiss the claims pursuant to Federal Rule of Civil Procedure 12(b)(6). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice" to defeat a Rule 12(b)(6) motion. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Applying *Iqbal* and *Twombly*, the Fourth Circuit has set forth a two part test to determine whether a complaint survives a 12(b)(6) motion to dismiss. *See Kendall v. Balcerzak*, 650 F.3d 515, 522-23 (4th Cir. 2011). First, the facts alleged in the complaint "must be enough to raise a right to relief above the speculative level" *Id.* Second, the complaint must "provide enough facts to state a claim to relief that is plausible on its face." *Robinson v. Am. Honda Motor Co., Inc.*, 551 F.3d 218, 222 (4th Cir. 2009). While a district court must accept all of the complaint's well-pleaded facts as true, this does not apply to legal conclusions, nor mere "threadbare recitals" or "mere conclusory statements." *Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 350 (4th Cir. 2013) (*quoting Iqbal*, 556 U.S. at 678).

Where, as here, a litigant characterizes but does not attach documents the authenticity of which is not reasonably subject to dispute, the Court is entitled to consider the content of such documents in assessing the sufficiency, and truth, of plaintiff's characterizations of those documents. *Zak*, 780 F.3d at 607; *see also Sarvis*, 80 F. Supp. 3d at 697.

ARGUMENT

The Supreme Court has cautioned that "courts should refrain from second-guessing the disciplinary decisions made by school administrators." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648 (1999); *see also Stefanowicz v. Bucknell Univ.*, No. 10-2040, 2010 WL 3938243, at *5 (M.D. Pa. Oct. 5, 2010) (Kane, C.J.). Plaintiff now asks this Court to disregard the Supreme Court's cautionary instruction and rehash a private, internal administrative disciplinary process and a result with which plaintiff is dissatisfied. Plaintiff wants this federal court, in other words, to act as a super-administrator and policy maker at a private University and dictate how the University adjudicates disputes between students on its campus. Courts have consistently refused to assume this role, and this Court should do the same.

I. **Count I (Title IX) Should be Dismissed with Prejudice for Failure to State a Claim.**

Title IX provides, in pertinent part, that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity" that receives federal funding. 20 U.S.C. § 1681(a). The Fourth Circuit has not precisely articulated the elements of a private Title IX claim in the context of a student disciplinary matter, but courts throughout the country, including in this district, routinely dismiss Title IX claims at the pleading stage where, as here, a plaintiff has failed to plausibly plead discrimination on the basis of gender. *See, e.g.*, *Doe v. Rector & Visitors of*

George Mason Univ., 132 F. Supp. 3d 712, 733 (E.D. Va. 2015); *Doe v. W. New England Univ.*, No. CV 15-30192-MAP, 2017 WL 113059, at *30 (D. Mass. Jan. 11, 2017); *Doe v. Baum*, No. 16-13174, 2017 WL 57241, at *23-26 (E.D. Mich. Jan. 5, 2017); *Austin v. Univ. of Or.*, No. 15-2257, 2016 WL 4708540, at *8-9 (D. Or. Sept. 8, 2016).

In so doing, courts have generally recognized that a cognizable Title IX claim arising from a disciplinary proceeding will fall within one of two categories: "erroneous outcome" based on gender, or "selective enforcement" based on gender. *See Doe v. Cummins*, No. 16-3334, 2016 WL 7093996, at *12 (6th Cir. Dec. 6, 2016) (citing *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994)); *see also W. New England Univ.*, 2017 WL 113059, at *27; *Sahm v. Miami Univ.*, 110 F. Supp. 3d 774, 777-78 (S.D. Ohio 2015); *see also Baum*, 2017 WL 57241, at *26-27; *Doe v. Univ. of the South*, 687 F. Supp. 2d 744, 756 (E.D. Tenn. 2009).

a. *Plaintiff Has Failed to State a Claim Under an Erroneous Outcome Theory*

Under the Second Circuit's formulation of an erroneous outcome claim articulated in the *Yusuf* case, a plaintiff must allege: (1) particular facts sufficient to cast doubt on the accuracy of the outcome of the challenged proceeding and (2) particular circumstances suggesting that gender bias was intentional and was a motivating factor behind the erroneous finding. *See George Mason Univ.*, 132 F. Supp. 3d at 732 (citing *Yusuf*, 35 F.3d at 715); *W. New England Univ.*, 2017 WL 113059, at *26 (collecting cases). "Sufficiently particularized allegations of gender discrimination "might include, inter alia, statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision–making that also tend to show the influence of gender." *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 766 (D. Md. 2015) (quoting *Yusuf*, 35 F.3d at 715). What will not suffice are bare legal conclusions or speculation. *See id.*

Plaintiff's allegations do not sufficiently cast doubt on the outcome of the investigation, adjudication, or appeal. His primary argument in this regard is that his story is more believable than Jane's and that the four University officials responsible for assessing the parties' respective stories got it wrong when they believed Jane's account of the sexual encounter instead of his.

The Court does not need to make a determination as to whether plaintiff has raised a satisfactory specter of doubt, however, because even "allegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to dismiss." *Yusuf*, 35 F.3d at 715. Put simply, plaintiff's erroneous outcome claim fails because he has not alleged "sufficient *factual* matter permitting a plausible inference of gender bias" as required by *Iqbal* and *Twombly*" *Doe v. Regents of the Univ. of Cal.*, No. 15-cv-02478, 2016 WL 5515711, at *5 (C.D. Cal. July 25, 2016) (emphasis in original).

There is not a single allegation in plaintiff's complaint that forms a particularized nexus between his gender and the outcome of the disciplinary proceeding. Plaintiff alleges in conclusory fashion that the Department of Education's Office for Civil Rights is aggressively enforcing Title IX, but does not show how that affected the adjudication of his particular case. Nor does he explain how hiring an investigator in a *subsequent case* constitutes particularized evidence of gender bias *in his case*. Plaintiff alleges that one feature of the University's policy purportedly gives complainants a review right not granted to respondents, but this provision is gender neutral, and applies evenly irrespective of the gender of the complainant or respondent. Moreover, plaintiff does not allege such a right was implicated in his case, or that it has *ever* been implicated.

Like the plaintiff in *Doe v. Baum,* plaintiff has "offered nothing more than an administrative decision by school officials with which he disagreed, and unelaborated allegations that the decision must have been due to 'gender bias,' essentially because he is male, the complainant is female, and the decision was adverse to him." 2017 WL 57241, at *24 (citing *Cummins,* 2016 WL 7093996, at *13 (rejecting Title IX claim because the plaintiffs 'fail[ed] to show how these alleged procedural deficiencies are connected to gender bias. . . . these deficiencies at most show a disciplinary system that is biased in favor of alleged victims and against those accused of misconduct.")). Plaintiff's conclusory "on information and belief" allegations grasp at straws and simply do not carry his burden.

b. *Plaintiff Has Failed to State a Claim Under a Selective Enforcement Theory*

"To support a claim of selective enforcement, [a male plaintiff] must demonstrate that a female was in circumstances sufficiently similar to his own and was treated more favorably by the [educational institution]." *Tafuto v. N.J. Inst. of Tech.*, Civ. A. No. 10-4521 (PGS), 2011 WL 3163240, at *2 (D.N.J. July 26, 2011) (quoting *Mallory v. Ohio Univ.*, 76 F. App'x 634, 641 (6th Cir. 2003)). "As such, a male plaintiff must allege that the [educational institution's] actions against [the male plaintiff] were motivated by his gender and that a similarly situated woman would not have been subjected to the same disciplinary proceedings." *Id.* (quoting *Univ. of the South*, 687 F. Supp. at 757).

Plaintiff's complaint includes no specific factual allegations demonstrating that the University's disciplinary process was motivated by plaintiff's gender, or that a similarly situated woman would not have been treated the same. *See Univ. of the South,* 687 F. Supp. 2d at 757. Plaintiff makes what are at best wholly conclusory and speculative allegations of selective enforcement. Indeed, the only selective-enforcement related allegations made by plaintiff –

conclusory though they are – would itself not satisfy the selective enforcement standard, since plaintiff focuses on purported differences in the ways the University would hypothetically treat *male complainants*. *See* Compl. ¶ 210. Plaintiff makes no allegations, particularized or otherwise, that he was treated differently than a *female respondent* in his position was in fact treated. *Cf. Albert v. Carovano*, 851 F.2d 561, 573 (2d Cir. 1988) (Section 1981 claim of selective enforcement in student disciplinary process failed because plaintiff made no allegation that similarly situated students of a different race were treated differently).[6]

Without judicial insistence on particularized allegations of selective enforcement, "every conclusory selective-enforcement claim would lead to discovery concerning the entire disciplinary history of a college and then to a confusing, unmanageable and ultimately incoherent retrial of every disciplinary decision, including decisions not to investigate." *Albert*, 851 F.2d at 574; *see also Austin*, 2016 WL 4708540, at *8 (dismissing Title IX claim because "conclusory allegations of a pattern of enforcement against males alone does not give rise to an inference of sex discrimination"); *Tafuto*, 2011 WL 3163240, at *3 (dismissing Title IX selective enforcement claim where claim was based on nothing more than plaintiff's conclusion that institution's decision-making was driven by plaintiff's gender). Plaintiff's conclusory allegations, lacking any gender-based factual averments, cannot support plaintiff's Title IX claim as a matter of law.

[6] Even if Doe had alleged that the University has not taken action against a female student for sexual misconduct, such allegation alone would not be sufficient to support his Title IX claim. "Simply because enforcement is asymmetrical does not mean that it is selectively so. It is a simple fact that the majority of accusers of sexual assault are female and the majority of the accused are male, therefore enforcement is likely to have a disparate impact on the sexes." *Austin*, 2016 WL 4708540, at *8.

II. Count II (Breach of Contract) and Count III (Good Faith and Fair Dealing) Should be Dismissed with Prejudice for Failure to State a Claim Because the University's Policy Is a Not a Contract

The relationship between student and private university in Virginia is not contractual in nature. It follows from the lack of a contract that there is no associated claim for a breach of any covenant of good faith and fair dealing.

To state a claim for breach of contract under Virginia law, a plaintiff must allege (1) a legally-enforceable obligation; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach. *Filak v. George*, 594 S.E.2d 610, 614 (Va. 2004). To state a claim for a breach of the covenant of good faith and fair dealing, a plaintiff must allege (1) a contractual relationship between the parties, and (2) a breach of the implied covenant. *Enomoto v. Space Adventures, Ltd.*, 624 F. Supp. 2d 443, 450 (E.D.Va. 2009) (citing *Charles E. Brauer Co. v. NationsBank of Va., N.A.*, 466 S.E.2d 382, 386 (Va. 1996)).

In *Doe v. Washington and Lee University*, a recent case decided by Hon. Norman K. Moon in the Western District of Virginia, Judge Moon explained succinctly that '[i]n order to have a contract with enforceable obligations, Virginia law requires an "absolute mutuality of engagement, so that each party has the right to hold the other to a positive engagement. If both parties are not bound to perform, then the contract is illusory and unenforceable." No. 14-cv-0052, 2015 WL 4647996, at *11 (W.D.Va. Aug. 5, 2015) (quoting *Smokeless Fuel Co. v. W.E. Seaton & Sons*, 52 S.E. 829, 830 (Va. 1906)).

Judge Moon went on to explain that "[c]ourts applying Virginia law routinely reject the notion that a 'Student Handbook' creates a mutuality of engagement where the terms of the handbook are subject to change." *Washington and Lee*, 2015 WL 4647996, at *11 (citing *Abbas v. Woleben*, No. 3:13–cv–00147, 2013 WL 5295672, at *4 (E.D.Va. Sept. 19, 2013) ("The handbook states that 'it is a useful guide ... [and] proposed modifications are always welcome.' These terms do not bind [the Medical College of Virginia] because they can change them at any time. Thus, the handbook does not establish a contract."); *Davis v. George Mason Univ.*, 395 F. Supp. 2d 331, 337 (E.D.Va. 2005) ("Here, the [George Mason University] Catalog amounts to an unenforceable illusory contract because it purports to promise specified performance, but the performance by GMU, the promissor, is entirely optional.").

In *Abbas*, this court considered and explicitly rejected an argument that the payment of tuition entitled the plaintiff to some amorphous set of contractual expectations. *See* No. 3:13–cv–00147, 2013 WL 5295672, at *4. To the contrary, since the Student Handbook and policy at issue were not contractual in nature, the plaintiff had no cause of action for breach of contract. *See Truell v. Regent Univ. Sch. of Law,* No. 04-cv-0716, 2006 WL 2076769, at *6-7 (E.D.Va. July 21, 2006) (handbook does not constitute a contract); *Brown v. Rector & Visitors of Univ. of Va.,* No. 3:07CV00030, 2008 WL 1943956, at *6 (W.D.Va. May 2, 2008) *aff'd*, 361 F. App'x 531, 534 (4th Cir. 2010) (same).

Here, as in *Abbas*, the Policy explicitly states that it "is not a contract" and that "it presents the policies in effect at the time of publication and ***is subject to change by the University at any time***." *See* Ross Decl. Ex. 1 at 1 (emphasis added). As a result, plaintiff cannot establish the first element of a breach of contract claim, *see Filak*, 594 S.E.2d at 614, and Count II must be dismissed with prejudice. It follows that because plaintiff cannot establish any contractual relationship with the University, he cannot establish the first element of a good faith and fair dealing claim, either. *See Enomoto*, 624 F. Supp. 2d at 450. Accordingly, Counts II and III must both be dismissed with prejudice.

III. Count IV (Negligence) Should be Dismissed with Prejudice for Failure to State a Claim Because Plaintiff Has not Articulated any Legal Duty Owed to Him.

To state a claim for negligence, a plaintiff must identify a legal duty, a violation of that duty, and resulting harm. *See Marshall v. Winston*, 389 S.E.2d 902, 904 (Va. 1990); *see also Jordan v. Jordan*, 257 S.E.2d 761, 762 (Va. 1979). The University has been unable to locate a single Virginia case which has recognized a legal duty of care owed by a university and its employees to a student in the context of a student disciplinary proceeding.

The burden is on the plaintiff to articulate a particularized standard of care or provide the legal authority from which a purported tort duty arises. With respect to plaintiff's negligence allegations, courts have held just the opposite – that no legal duty exists in the context of a college or university misconduct proceeding. For instance, in *McFadyen v. Duke University*, the United States District Court for the Middle District of North Carolina explained that "the university-student relationship alone does not impose an actionable duty of care on administrators or advisors in the discharge of their academic functions." 786 F. Supp. 2d 887, 998 (M.D.N.C. 2011), *rev'd in part on other grounds*, 703 F.3d 636 (4th Cir. 2012). Other courts in this Circuit are in accord. *See, e.g., Keerikkattil v. Hrabowsi*, No. 13-2016, 2013 WL 5368744, *9 (D. Md. Sept. 23, 2013) (dismissing negligence action where the plaintiff failed to allege a specific standard of care during misconduct hearings and holding that purported violations of Title IX cannot form the basis of a negligence action); *DeCecco v. Univ. of South Carolina*, 918 F. Supp. 2d 471, 502 (D.S.C. 2013) (dismissing negligence claim against university because the plaintiff could not articulate a university's legal standard of care in sexual assault investigations).

In the case of a heretofore unrecognized right, however, other states' laws are decidedly not the touchstone. To the contrary, federal courts "rule upon state law *as it exists* and do not surmise or suggest its expansion." *Burris Chem., Inc. v. USX Corp.*, 10 F.3d 243, 247 (4th Cir. 1993) (emphasis added); *see also Grayson v. Anderson*, 816 F.3d 262, 272 (4th Cir. 2016) (same); *Guy v. Travenol Labs., Inc.*, 812 F.2d 911, 917 (4th Cir. 1987) ("In applying state law, federal courts have always found the road straighter and the going smoother when, instead of blazing new paths, they restrict their travels to the pavement"). Where, as here, plaintiff purports to assert a cause of action for which there is no support in Virginia state law, this court must dismiss the claim with prejudice.

In the alternative, the negligence claim against Linda McMurdock in her individual capacity should also be dismissed because plaintiff's complaint contains no allegation that Dr. McMurdock acted outside of the course and scope of her duties as Title IX Coordinator. In the event any defendant in this civil action is liable for damages arising out of plaintiff's negligence claim – a proposition with which the University strongly disagrees – that defendant is the University, not Linda McMurdock. Because plaintiff alleges no facts that suggest McMurdock undertook any allegedly negligent act in an individual capacity, Dr. McMurdock should be terminated from this lawsuit as a defendant. *See Taylor v. Mason*, 164 S.E.2d 652, 653 (Va. 1932) (dismissing suit against receiver of corporation in his individual capacity because plaintiff pled "no allegation or proof of any personal misconduct or negligence on the part of Taylor which would support a personal judgment against him.").

IV. Count V (Law of Associations) Should be Dismissed with Prejudice for Failure to State a Claim

The University was able to locate only one case in the Commonwealth of Virginia that mentions the common law of associations in relationship to an institution of higher education. In *Helton v. Univ. of Richmond*, 2 Va. Cir. 254, 254 (City of Richmond, Jan. 7, 1985), the Court determined, without analysis, that "[w]hether . . . considered on the basis of contract, the law of associations or a duty to comply with the procedures it represents will be afforded as a matter of fairness, it is the Court's opinion that plaintiff has established her right to the relief. . . . " *Id.* The Court provided no analysis of the elements or contours of the common law of associations duty, nor did it cite any authority under Virginia law that such a duty is owed by an institution of higher education to a student. As best the University can determine, no Virginia appellate court, nor any trial level court apart from *Helton* (which itself did not hold that such a right exists), has ever recognized a right by a student against a university under any "law of associations."

For the same reasons articulated in *Burris* and *Grayson* and discussed in the preceding section, this court must dismiss the plaintiff's law of associations claim with prejudice because there is no basis in Virginia law for it.

CONCLUSION

For all the foregoing reasons, Plaintiff's claims against the University and Linda McMurdock should be dismissed with prejudice for failure to state a claim.

Respectfully submitted,

Dated: April 25, 2017

Marymount University and Linda Murdock,

By Counsel,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of April, 2017, the foregoing **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS MARYMOUNT UNIVERSITY AND LINDA MCMURDOCK'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT** was filed via the Court's electronic filing system and served upon the following:

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I further certify that the following party for whom counsel has not yet entered an appearance has been served by first-class U.S. mail:

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